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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 937

STATE OF ILLINOIS, ILLINOIS COMMERCE COMMISSION, and NORTH SHORE COMMUTERS ASSOCIATION,
(Plaintiffs) Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and CHICAGO, NORTH SHORE & MILWAUKEE RAILWAY,
(Defendants) Appellees.

APPEAL FROM THE DECREE OF A UNITED STATES DISTRICT COURT OF THREE JUDGES SITTING IN AND FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

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IN THE

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STATE OF ILLINOIS, ILLINOIS COMMERCE COMMISSION, and NORTH SHORE COMMUTERS ASSOCIATION,
(Plaintiffs) Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and CHICAGO, NORTH SHORE & MILWAUKEE RAILWAY,
(Defendants) Appellees.

APPEAL FROM THE DECREE OF A UNITED STATES DISTRICT COURT OF THREE JUDGES SITTING IN AND FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

JURISDICTIONAL STATEMENT.

This case is before this Court on appeal by the State of Illinois and Illinois Commerce Commission, and the North Shore Commuters Association (Plaintiffs, below) from a final judgment and decree of a three-judge District Court (Appendix hereto, pp. i-ii) dismissing Plaintiffs' complaint and denying the prayer for a decree setting

aside and permanently enjoining enforcement of an order of the Interstate Commerce Commission authorizing Chicago, North Shore & Milwaukee Railway (hereinafter referred to as "the North Shore") to abandon its entire railroad.

Appellants submit this jurisdictional statement, pursuant to Rule 15, to show: (1) that this Court has jurisdiction of these appeals, and (2) that the questions are so substantial as to require plenary consideration, with briefs on the merits and oral argument for their resolution.

A.

THE OPINION BELOW.

The opinion of the three-judge District Court has not yet been reported. It is set forth in the Appendix to this Statement, at pages iii to xviii.

B.

THE GROUNDS UPON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

1.

The Nature of the Proceeding and the Statute Pursuant to Which It Is Brought.

(a)

The Complaint and the Relief Prayed.

This action was instituted by a complaint filed June 10, 1962, and a supplemental complaint filed October 24, 1962. The complaint, as supplemented, sought to set aside and

to enjoin enforcement of an order of the Interstate Commerce Commission entered May 10, 1962, as confirmed by order entered October 15, 1962 authorizing North Shore to abandon its entire railroad, including interstate operations between Chicago and Milwaukee and intermediate points, and intrastate operations between Chicago and suburban communities to the north in Illinois.

The order of the Commission sought to be set aside was entered on application of the North Shore for leave to abandon the railroad, filed under Section 1, Paragraph (18) of the Interstate Commerce Act (Title 49 USC) (set forth in Appendix, pp. xxxviii to xxxix).

The complaint attacked the validity of the Commission's order, purporting to authorize the abandonment, on the following grounds:

(1) The North Shore's railroad is exempted from jurisdiction of the Interstate Commerce Commission to authorize abandonment, by Section 1, Paragraph (22) of the Interstate Commerce Act (Title 49 USC) (Appendix p. xxxix), reading as follows:

> "(22) The authority of the Commission conferred by paragraphs (18) to (21) of this section, both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

The Appellants (Plaintiffs, below) contend that (as held by this Court in *United States* v. *Chicago, North Shore & Milwaukee Railroad Company*, 288 U. S. 1, in construing an identical exemption in another section of the same statute) North Shore's railroad is "an interurban electric railway which is not a part or parts of a general steam

railroad system of transportation" and is therefore within the exemption in Section 1, Paragraph (22).

(2) If, contrary to the above contention, it is held that the North Shore's railroad is not exempted from the jurisdiction of the Commission by Section 1, Paragraph (22) of the Interstate Commerce Act, the Commission had no jurisdiction to authorize abandonment of the separate intrastate operations.

(b)

The Orders Of The Interstate Commerce Commission.

The final order of the Interstate Commerce Commission (not yet reported), purporting to authorize abandonment of the North Shore's railroad, was entered on October 15, 1962. It supplemented and adhered to a prior order entered May 10, 1962, reported 317 ICC 191, which had also authorized abandonment, the effective date of which had been suspended, pending determination of a petition for reconsideration.

Extracts from the reports and orders of the Interstate Commerce Commission, including the parts thereof relating to the jurisdictional questions here involved, are set forth in the Appendix hereto at the following pages:

The report and order of October 15, 1962 (not reported), at pages xix to xxvii of the Appendix;

The report and order of May 10, 1962 (317 ICC 191) at pages xxvii to xxx of the Appendix;

An interim report dated May 4, 1960 (312 ICC 99, incorporated by reference in the subsequent reports) at pages xxx to xxxiii of the Appendix.

(c)

The Statutes Conferring Jurisdiction On the District Court to Entertain This Action.

The right to maintain this action and the jurisdiction of the District Court are conferred by Paragraph (20) of Section 1 of the Interstate Commerce Act (Title 49) and by Section 1336 of the Judicial Code (Title 28).

The Commission's order purporting to authorize abandonment rests on the supposed jurisdiction conferred by Paragraphs (18) and (20) of Section 1 of the Interstate Commerce Act. If, as Appellants contend, North Shore's railroad was exempted by Paragraph (22) of Section 1 from the jurisdiction of the Commission under Paragraphs (18) to (20) of Section 1, there was no valid order authorizing abandonment. Enforcement of the Commission's order may therefore be enjoined under Paragraph (20) of Section 1, reading, so far as material, as follows (Appendix, p. xxxix):

> "(20) Any * * * abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; * * *."

The right to maintain a similar action under Paragraph (20) of Section 1 was sustained in *United States* v. *Idaho*, 298 U. S. 105 (109-10).

Jurisdiction of the District Court over this action is also expressly conferred by Section 1336 of the Judicial Code (Title 28 USC) which reads as follows (Appendix, p. xl):

"Except as otherwise provided, the District Court

shall have jurisdiction of any civil actions to enforce, enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission."

(d)

The Requirement for a Three-Judge Court.

Section 2325 of the Judicial Code (Title 28) requires that an action to set aside and enjoin enforcement of an order of the Interstate Commerce Commission be heard and determined by a three-judge court. Section 2325 reads as follows (Appendix, p. xl):

"An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a District Court of three judges under Section 2284 of this Title."

2.

The Decree Sought To Be Reviewed.

The decree, from which this appeal is taken, denying the application to set aside and enjoin enforcement of the order of the Interstate Commerce Commission, was entered December 10, 1962. A copy of the decree is set forth in the Appendix, pp. i to ii. No findings of fact or conclusions of law were incorporated in the decree or were filed separately.

Notice of appeal to this Court was filed in the United States District Court for the Northern District of Illinois, Eastern Division, by North Shore Commuters Association on December 21, 1962, and by the State of Illinois and Illinois Commerce Commission on February 7, 1963. Extracts from the Notices of Appeal, showing the questions presented thereby, are set forth in the Appendix at pages xxxiii to xxxvii.

The time for Appellant, North Shore Commuters Association, to file the record and docket the case in the Supreme Court of the United States was extended by order of the District Court to, and including, March 19, 1963 (Appendix p. xxxv).

3.

THE STATUTORY PROVISION CONFERRING ON THIS COURT JURISDICTION OF THE APPEAL.

Jurisdiction of this Court over this appeal from a decree of a three-judge District Court is conferred by Section 1253 of the Judicial Code (Title 28) reading as follows (Appendix, p. xl):

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding, required by Act of Congress to be heard and determined by a district court of three judges."

The exception noted in the foregoing quotation has no application here. It follows, therefore, that this Court has jurisdiction of this appeal.

The decision of this Court in *Chicago, Milwaukee, St. Paul & Pacific Ry.* v. *Illinois*, 355 U. S. 300 (302) sustained the jurisdiction of this Court on a like appeal from a decree of a three-judge District Court.

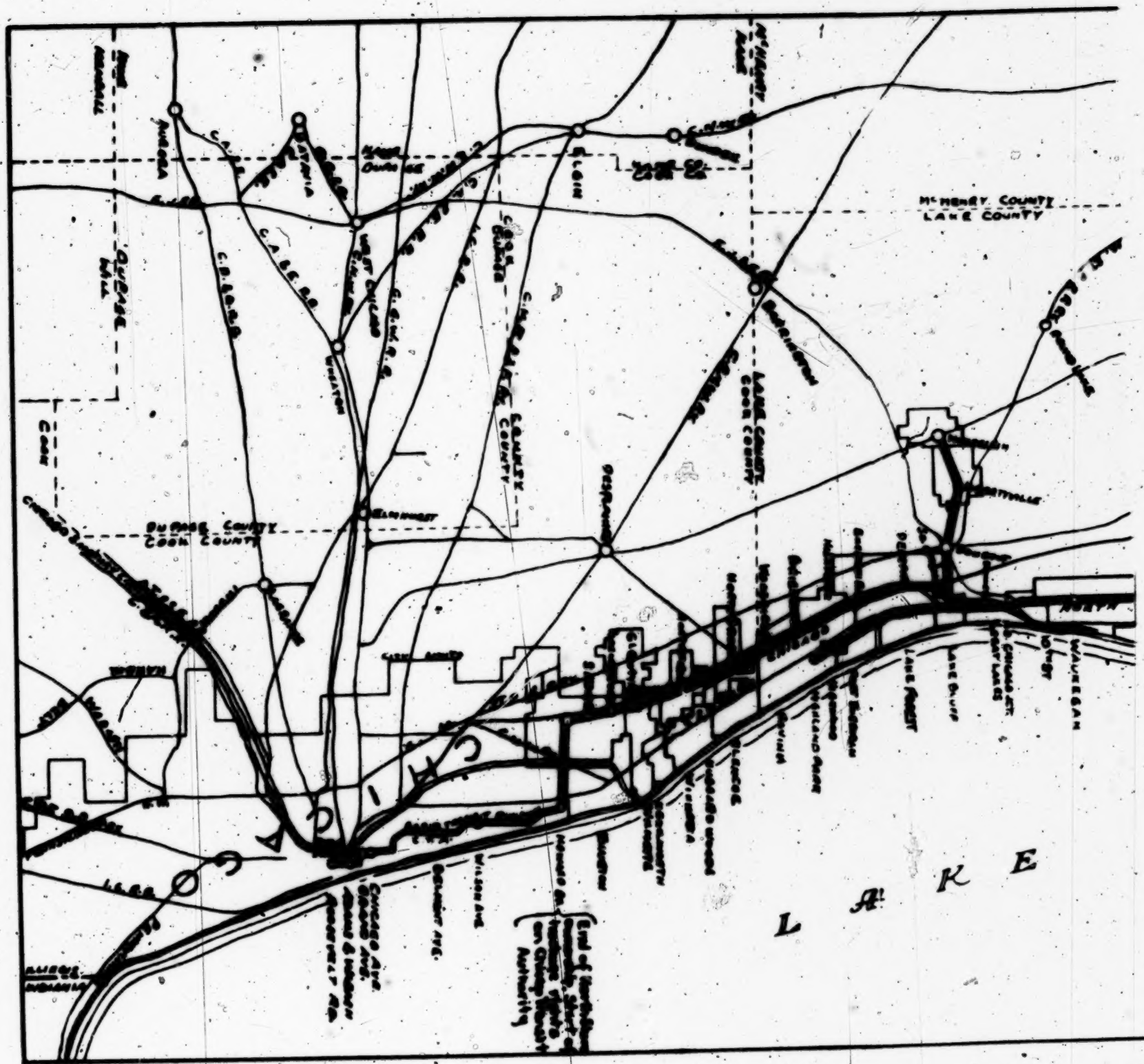
C.

THE QUESTIONS PRESENTED BY THE APPEAL.

The questions presented by this appeal are:

(1) Whether the three-judge District Court erred in holding that the North Shore's railroad is not "a street, suburban or interurban electric railway which is not operated as a part or parts of a general steam railroad system of transportation" and therefore is not excluded by Paragraph (22) of Section 1, Title 49 USC, from the jurisdiction of the Interstate Commerce Commission to authorize its abandonment; and

(2) Whether, assuming *arguendo* that the North Shore is not within the exclusion of Paragraph (22), Section 1, Title 49 USC, the Interstate Commerce Commission nevertheless has jurisdiction to authorize abandonment of that part of the North Shore's railroad which is wholly devoted to intrastate commerce.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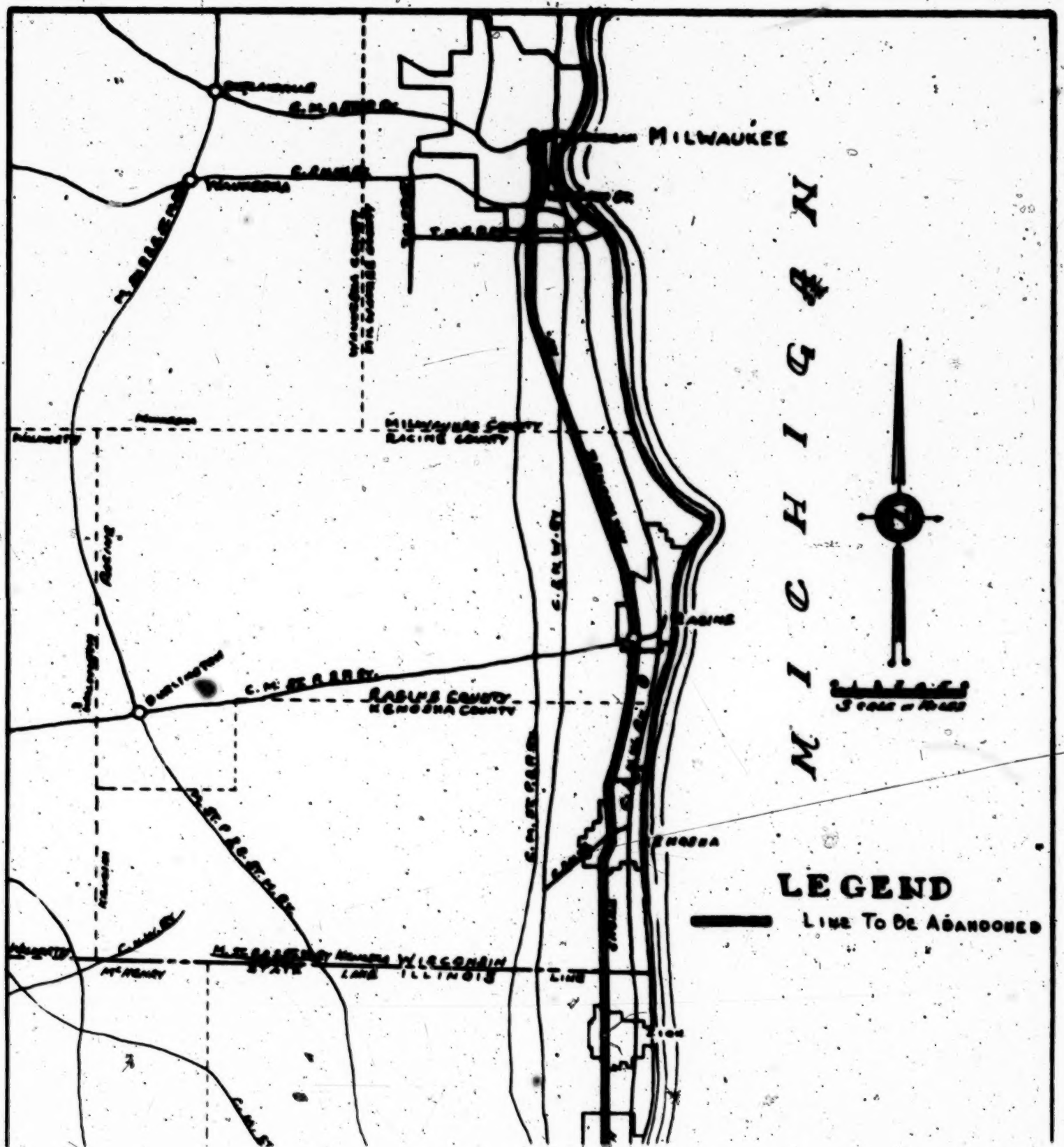
MILWAUKEE
MICHIGAN
RACINE COUNTY
KENOSHA COUNTY
ILLINOIS
LEGEND
LINE TO BE ABANDONED

D.

THE STATEMENT OF THE CASE.

1.

The Character of the North Shore's Railroad.

The North Shore operates an electric railroad, rendering two distinct passenger services:

1. An interstate service between Chicago and Milwaukee and intermediate points; and

2. Separate intrastate suburban services between Chicago and Mundelein, and between Chicago and Waukegan or Zion and intermediate suburban communities.

A plat showing the location of the rail lines is inserted opposite this page.

The southern terminus of the railroad is at the Roosevelt Road station of the elevated lines of the Chicago Transit Authority. The North Shore's trains run on the elevated tracks between Roosevelt Road and the Chicago city limits at Howard Street, stopping en route at various elevated stations in the downtown and north side districts of Chicago.

North from Howard Street, the trains run on a private right-of-way (the Skokie Valley Line) to a point a short distance west of Lake Bluff, where the Mundelein branch turns west to a terminus at Mundelein, and the Waukegan and Milwaukee branch continues north to the suburban terminus in Waukegan or Zion, Illinois, and thence (as to interstate traffic) into Wisconsin, through Kenosha and Racine to Milwaukee.

In Milwaukee, the trains operate in the street, on street-

car tracks owned by the Milwaukee Electric Railroad, a wholly-owned subsidiary of the North Shore.

The electric motor furnishing the power for each train is in the forward car, as in elevated or subway trains, and the cars resemble generally the cars used in such trains.

In 1958, the passenger traffic on the North Shore's railroad was divided between the intrastate and interstate services (Ex. 74), as follows:

	Number of Passengers	
Interstate		
Between Chicago or North Chicago Junction and Milwaukee		2,601,908
Intrastate		
Suburban service between Chicago and Waukegan or Zion	1,175,692	
Suburban service between Chicago and Mundelein	1,374,095	2,549,787
Total		5,151,695

For the 12 months ending May 31, 1961, due to rapid increase in population of the suburban areas served by the North Shore (Ex. 36), the traffic on the intrastate trains had increased so that it exceeded that on the interstate trains—both as to number of trains and as to revenue.

As shown by the train schedule in evidence (Ex. C-91), there were then 101 trains operating each week day, divided as follows between interstate and intrastate traffic:

Interstate Traffic	Number of Trains		Per Cent of Total
Trains between Chicago and Milwaukee		48	47.5%
Intrastate Traffic			
Trains between Chicago and Terminal at Waukegan or Zion, Illinois	21		
Trains between Chicago and Terminal at Mundelein, Illinois	32	53	52.5%
Total		101	100.0%

The revenue for the 12-month period ending May 31, 1961 was divided between interstate and intrastate traffic (Ex. C-13), as follows:

	Amount	Per Cent of Total
Revenue from Illinois intrastate traffic	$2,923,126	62.38%
Revenue from Wisconsin intrastate traffic	351,199	7.49%
Revenue from interstate traffic	1,412,012	30.13%

2.

THE FREIGHT SERVICE.

The North Shore owns no freight cars. Its freight business consists of transporting cars of connecting railroads over parts of the North Shore's line to or from points on the North Shore's line or connecting lines. No freight is handled at the terminals of the North Shore in Chicago or in Milwaukee, or over its lines in either city.

The distribution of transportation revenues between

freight and passenger service for the years 1959 and 1960, and for the first seven months of 1961, is as follows:

	Passenger	Freight	Miscellaneous Revenue	Total Transportation Revenue	Percent Freight Revenue Bears to Total Transportation Revenue
For 1959 (Ex. C-1)	$4,507,685	$934,722	$253,008	$5,695,415	16.4%
For 1960 (Ex. C-3)	4,747,612	812,595	246,607	5,806,814	14.0%
For 1st 7 Mo. 1961 (Ex. C-5)	2,539,067	449,684	134,538	3,123,289	14.3%

As was said by this Court in holding that the North Shore's railroad was "an interurban electric railroad," notwithstanding the relatively minor freight traffic (then 22% as against 14% now) (*United States* v. *Chicago, North Shore & Milwaukee R. Co.*, 288 U. S. 1, 10):

> "We thus have a typical example of an interurban electric line for passenger service which has developed, in addition, such freight traffic as could advantageously be conducted without interfering with performance of the main purpose of the carrier."

3.

THE QUESTION AS TO THE CONTROLLING EFFECT OF THE DECISION IN UNITED STATES *vs.* C. N. S. & M. R. Co., 288 U. S. 1,—"THE PRIOR NORTH SHORE CASE."

In *United States* v. *C. N. S. & M. R. Co.*, 288 U. S. 1 (herein referred to as "the prior North Shore case") the question involved was whether the North Shore was exempted from jurisdiction of the Interstate Commerce Commission under a provision in Paragraph (1) of Section 20a of the Interstate Commerce Act (relating to securities) excepting from the carriers subject to the juris-

diction of the Interstate Commerce Commission under that Section:

> "* * * a street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation."

Except for substitution of the singular for the plural number, the exemption provision (Paragraph (1) of Section 20a, construed by this Court in the prior North Shore case) is thus identical with that in Paragraph (22) of Section 1 involved in the instant case. And, as the Court pointed out in distinguishing the decision in *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Commission*, 286 U. S. 299 (which held the exemption in Paragraph (22) not applicable to a railroad whose business was predominantly the carriage of freight) the two exemptions are "couched in the same language" and hence should be given like interpretation when applied to the same railroad (288 U. S., at p. 10).

As appears from the quotation at page 12, above, the Court, in the prior North Shore case, held that the North Shore's railroad is "a typical example of an interurban electric line for passenger service"—the minor freight service being purely incidental.

And after a full review of the facts showing the character of the railroad (which do not differ from the facts now applicable), the Court stated that "as a matter of first impression" and irrespective of administrative construction, it was "inclined to hold" that the North Shore's railroad is within the exemption. As to this, the Court said (288 U. S. at pp. 10-11):

> "If the status of the appellee [the North Shore Railway] were a matter of first impression, we should, though the matter is not free from difficulty, be inclined to hold Section 20(a) inapplicable [*i.e.*, to hold

the North Shore Railway to be within the exemption]. But for the reasons about to be stated, we consider the question settled."

The Court then pointed out that the North Shore had repeatedly issued securities with the approval of the State Commission only and that the Interstate Commerce Commission had made no objection thereto and had apparently acquiesced in the assumption that the North Shore's railroad was within the clause exempting it from the Interstate Commerce Commission's jurisdiction. The Court held, therefore (288 U. S., at p. 13), that the administrative construction removed all doubt and sustained the conclusion, already reached "as a matter of first impression," that the North Shore was within the exemption clause in Paragraph 1 of Section 20a—identical with the exemption clause involved in the instant case.

In the report of the Interstate Commerce Commission here involved (as followed and affirmed by the court below in this case), the primary authority cited for disregarding the decision of the Supreme Court in the prior North Shore case (see Appendix, pp. xiii, xix-xxi, xxxi) is the two to one decision (290 ICC 765) of a three-man division of the Commission. In that proceeding (referred to herein as "the Shore Line case"), the division hearing the case authorized abandonment of the Shore Line branch of the North Shore's railroad, and held (contrary to the decision of the Supreme Court in the prior North Shore case) that the North Shore's railroad is not "an interurban electric railroad which is not part or parts of a general steam railroad system of transportation," within the provision in Paragraph (22) exempting such a railroad from the jurisdiction of the Commission.

In support of that conclusion, the Commission relied primarily on the decision in the *Piedmont & Northern Railway* case, 286 U. S. 299 holding that a railroad owning

287 freight cars and deriving 95% of its revenue from freight traffic is not within the exemption. The decision in that case is distinguished in the prior North Shore case (288 U. S., at p. 10) and held not to be applicable to the North Shore.

One of the Commissioners dissented from the decision in the Shore Line case, on the following stated ground (290 ICC at p. 798):

> "In view of the decision in *United States* v. *C. N. S. & M. R. Co.*, 288 U. S. 1, I would dismiss this application for want of jurisdiction."

There was no review by the full Commission or by a court, of the decision of the division in the Shore Line case, and it could hardly be held to overrule the Supreme Court.

The decision on the question of jurisdiction, and as to the facts relating thereto, is for the Court and not for the Commission. (*United States* v. *Idaho*, 298 U. S. 105, 109; and *Yonkers* v. *United States*, 320 U. S. 685, 689.)

In *In Re Chicago, North Shore & Milwaukee Railroad*, 131 Fed. 2d 458 (CCA, 7th Circuit; cert. den. 318 U. S. 768) the question was whether a provision in Section 77 of the Bankruptcy Act, exempting from the purview thereof "interurban electric railroads which are not part of a general steam railroad system of transportation," or which have less than one-half their business in freight, applied to the North Shore's railroad. The Court, following the decision of the Supreme Court in the prior North Shore case, held that the exemption provision did so apply, stating (131 Fed. 2d at p. 459):

> "* * * the Supreme Court in 1933 upheld the decision of the District Court that this road was 'an independently operated electric interurban railway expressly excepted from the requirements of the section [*i.e.*, Section 20a].' *United States* v. *Chicago, N. S. & M. R. Co.*, 288 U. S. 1, 53 S. Ct. 245, 246, 77 L. Ed. 583."

And then after distinguishing the earlier case of *Sprague* v. *Woll*, 122 Fed. (2) 128, which held the North Shore to be subject to the Railway Labor Act, and not to be within an exemption substantially different from that here involved, the Court continued as follows (131 Fed. 2d, at p. 160):

> "We think there can be no question but that this road is not 'operating as a part of a general steam railroad system of transportation.'"

It is the appellants' contention that the decision in the prior North Shore case (288 U. S. 1) is controlling, and that the Court erred in not following that decision in deciding the instant case, and in not holding that the North Shore's railroad is an interurban electric railroad exempted by Paragraph (22) of Section 1 of the Interstate Commerce Act from the jurisdiction of the Interstate Commerce Commission.

4.

THE QUESTION AS TO JURISDICTION OF THE INTERSTATE COMMERCE COMMISSION OVER THE INTRASTATE SERVICE.

(a)

The Interstate Commission Has No Jurisdiction Over the Intrastate Traffic Where Its Continuance Can Cast No Undue Burden on Interstate Traffic.

Section 1 of the Interstate Commerce Act (Appendix p. xxxviii), provides as follows:

> "(2) The provisions of this chapter [*i.e.*, the Interstate Commerce Act] * * * shall not apply—
>
> (a) To the transportation of passengers or property * * * wholly within one state * * * except as otherwise provided in this chapter."

The exception noted applies only if an authorization to abandon intrastate traffic is necessary to relieve interstate traffic of an unfair burden.

In the instant case, if the jurisdiction of the Interstate Commerce Commission to authorize abandonment of North Shore's interstate traffic is upheld, the jurisdiction of the Interstate Commerce Commission over intrastate traffic cannot be sustained on the ground that intrastate traffic puts an undue burden on the interstate traffic of the North Shore, because the North Shore's interstate traffic will then be nonexistent.

See: *Texas* v. *Eastern Texas R. R. Co.*, 258 U. S. 204 (217-18).
Colorado v. *United States*, 271 U. S. 153 (169-170).

(b)

The Intrastate Traffic on the North Shore's Railroad Is Separate From and Not Integrated With the Interstate Traffic.

The assumption in the report of the Interstate Commerce Commission (Appendix, pp. xxiii to xxiv) and in the opinion of the District Court (Appendix, pp. xiii to xiv) that the interstate and intrastate business of the North Shore are somehow "co-mingled" and "integrated" and are not capable of practical "disjunction," are not supported by any substantial evidence.

The intrastate trains between Chicago and terminals at Waukegan or Zion, Illinois, and between Chicago and the terminal of the Mundelein branch at Mundelein, Illinois, are not part of any interstate system of transportation.

Mundelein is not on an interstate route.

The tracks to Waukegan and Zion are also used by interstate trains passing north to Milwaukee—but the separa-

tion of the intrastate traffic which is carried by separate intrastate trains listed in the tabulation at page 11, above, is not altered by the fact that there are other trains on the railroad that cross a state line.

As pointed out in the interim report of the Interstate Commerce Commission (Appendix, p. xxxi), at the time the North Shore filed with the Interstate Commission the application here involved, for leave to abandon its railroad, it also filed with the Illinois Commerce Commission a companion application asking for authority to abandon its railroad, insofar as that Commission had jurisdiction thereover.

Joint hearings were held before the Interstate and Illinois Commissions and the Illinois Commission denied the application filed before that Commission.

No steps were taken to review the decision of the Illinois Commission. If conditions have changed, so as to call for further consideration, an application may again be presented to the State authorities.

There is no basis for the assumption that intrastate traffic is not separate from the interstate traffic, and that it cannot be carried on independently under State regulation.

(c)

The Question Whether the Continuance of the Intrastate Traffic Will Cast an Undue Burden on the Interstate Commerce of the North Western and Milwaukee Railroads.

The report of the Interstate Commerce Commission (Appendix, pp. xxiv-xxv) and the opinion of the three-judge Circuit Court (Appendix, p. xiv and note 4), sustaining the jurisdiction of the Commission over the intrastate traffic, rest in large part on the assumption that the abandonment

of the intrastate service on the North Shore's railroad will benefit the intrastate suburban service of the Chicago & North Western and the Chicago, Milwaukee, St. Paul & Pacific Railroads, and by increasing their revenues will have a beneficial effect on their interstate service. The conclusion, apparently, is that continuance of the North Shore's intrastate service casts a burden on the interstate commerce of competitor roads and hence that the Interstate Commerce Commission has jurisdiction to authorize its abandonment and public convenience will be served thereby.

There is no evidence or finding to support that conclusion.

But even if the conclusion were correct, it furnishes no basis for the further assumption that public convenience would therefore be served by abandonment of the North Shore's intrastate service and the shifting of some or all of the passengers to the other two railroads.

The North Shore has been serving communities along its railroad north of Chicago for many years. It renders a distinct special service to the Loop District of Chicago and to outlying business districts to the north and south of the Loop—a service not rendered by either the North Western or the Milwaukee Railroads.

This is a local service—not an interstate service.

Despite higher fares, the North Shore has consistently had more patronage than either of the other railroads from competing stations.

The following comparison of passenger traffic for the year 1957 from points where the North Shore and the North Western or Milwaukee Railroads supposedly compete, shows the preponderance of the traffic on the North Shore, and the preference of the suburban passengers for the North Shore service (Exs. 85, 86, 87):

NUMBER OF PASSENGERS.

Station	North Shore	C&NW	CMStP&P	Percent Using North Shore
Mundelein	225,165	—	—	100%
Libertyville	215,264	—	90,402	70%
Sheridan Elms	39,799	—	6,659	86%
Zion	90,786	6,786	—	94%
Waukegan	440,329	136,385	—	76%
North Chicago	75,687	27,404	—	73%
Great Lakes Naval Training Station	291,619	1,498	—	99%

South of the above-listed stations, the North Western and Milwaukee Roads are several miles distant from the North Shore, and the percentages vary; but even if we consider as competing, the more distant but parallel service, the North Shore still has 51% of the total traffic in the area in which the North Western Railroad might be deemed to be a competitor, and 61% of the total traffic in the area in which the Milwaukee Railroad might be so considered.

Under those circumstances, it could hardly be argued that cutting off the much-used special service rendered by the North Shore would contribute to the public convenience. The figures indicate that public convenience and necessity, as measured by major patronage for many years, would be served best by maintenance of the North Shore's intrastate service.

But, again, since it is the intrastate service that is involved, we submit that this is a question for the State Commission, and not for the Interstate Commission.

5.

The Alleged Operating Losses.

The Interstate Commerce Commission found that the North Shore is suffering operating losses that could not be eliminated by improved operating methods and the fixing of adequate fares.

There is substantial evidence in the record (Ex. 112) to show that no real attempt was made to eliminate the losses; that a plan was formulated in 1954 (Ex. 112) to abandon the line after a lapse of 5 years, irrespective of profit or loss and thus to procure a $20,000,000 (or more) "tax shelter."

But the presence or absence of operating losses does not affect the determination of jurisdictional issues raised by the complaint in this suit. If the Interstate Commerce Commission has no jurisdiction, it cannot grant the relief asked.

There is no ground for an assumption that if relief is due, it cannot be obtained by appropriate action before the state authorities. In any event, Congress has elected to leave to those authorities the power to pass on the questions raised and to grant any relief that may be called for.

E.

THE QUESTIONS ARE SUBSTANTIAL.

1.

By Act of Congress, jurisdiction over abandonment procedure relating to "interurban electric railways" is taken from the Interstate Commerce Commission and left to the state regulatory commission, so long as the interurban electric railways involved are not "part or parts of a general steam railroad system of transportation."

This Court has held (in the prior North Shore case, 288 U. S. 1): (1) that the North Shore's railroad is an "interurban electric railway" and "not part of a general steam railroad system of transportation"; and (2) that its freight business (then 22%, now 14% of the total) is minor and incidental and does not alter the character of the railroad, and hence that it is within the exemption in Paragraph (1) of Section 20(a) of the Interstate Commerce Act, identical in wording with the exemption in Paragraph (22) of Section 1, here involved.

The decision of the three-judge District Court from which this appeal is taken, and the report and order of the Interstate Commerce Commission there reviewed, are in conflict with the decision of the Supreme Court in the prior North Shore case.

The North Shore's railroad is an electric railway extending over the 90-mile distance between Chicago and Milwaukee—with a branch line in the suburban area of Chicago to the west. The North Shore's railroad operates over city streets, both in Chicago and Milwaukee. It owns no freight cars and carries on a typical interurban and

suburban passenger business. It is an important mass transportation medium.

It is important, particularly in view of the prior decision of the Supreme Court, that a final determination be made by the Court as to whether or not the exemption (Paragraph (22) of Section 1) of interurban electric railways from jurisdiction of the Interstate Commerce Commission, applies to this railroad.

If the exemption is held to apply, then it follows that the decree appealed from must be reversed, and the question as to whether public convenience and necessity permit abandonment of this railroad must be left to the state regulatory commissions for decision.

2.

If it is held (contrary to appellant's contention) that the North Shore's railway is not an "interurban electric railway," exempted by Paragraph (22) of Section 1 of the Interstate Commerce Act from jurisdiction of the Interstate Commerce Commission so that the order authorizing abandonment of interstate commerce is valid, the interstate commerce will be abandoned and will no longer exist. It then becomes important to those served by the separate intrastate suburban service that a determination be made as to whether the Interstate Commerce Commission has jurisdiction to authorize abandonment of that service.

Jurisdiction over intrastate traffic, where no interstate traffic is involved or adversely affected thereby, is a matter wholly within the jurisdiction of the state regulatory bodies,

3.

Determination of the questions involved is of great importance to thousands of persons served by the North Shore's interstate and intrastate service, and to solution of the problems of mass transportation in the metropolitan areas affected.

We submit that the questions presented by these appeals are substantial, and of such serious import as to require plenary consideration with briefs on the merit and oral argument for their determination; and that probable jurisdiction should be noted.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT.

Northern District of Illinois,

Eastern Division.

State of Illinois, Illinois Commerce Commission and North Shore Commuters Association, *Plaintiffs*, *vs.* United States of America, Interstate Commerce Commission, and Chicago, North Shore & Milwaukee Railway, *Defendants.*	Civil Action No. 62 C 1156

FINAL JUDGMENT AND DECREE.

(Entered December 10, 1962)

The above-entitled action having come on for hearing on November 7, 1962, before this Court, constituted as a three-judge district court under section 2284 of the Judicial Code, 28 U.S.C. § 2284, and this Court on December 5, 1962, entered its opinion dismissing the complaint and granting the counterclaim requested, it is hereby,

Ordered, Adjudged and Decreed that the relief prayed for in the complaint be denied, that the complaint be dismissed, and that the plaintiffs and each of them, their agents, employees and attorneys be enjoined by the decree of this court from in any manner interfering with the defendant's right to terminate its entire operations and dispose of its property all in accordance with and pursuant to the authority conferred by the certificate of the Interstate

Commerce Commission in its order and certificate issued May 10, 1962.*

Dated at Chicago, Illinois, this 10th day of December, 1962.

Luther M. Swygert
United States Circuit Judge

Julius H. Miner
United States District Judge

James B. Parsons
United States District Judge

---

*Note: The effective date of the Interstate Commerce Commission's order of May 10, 1962, was deferred pending reconsideration of the order. The order was later confirmed in the Commission's final order of October 15, 1962. See pages xxvi-xxvii *post*.

IN THE UNITED STATES DISTRICT COURT.
Northern District of Illinois,
Eastern Division.

State of Illinois, Illinois Commerce Commission, and North Shore Commuters Association, *Plaintiffs,* *vs.* United States of America, Interstate Commerce Commission, and Chicago, North Shore & Milwaukee Railway, *Defendants.*	Civil No. 62-C-1156

OPINION OF THE THREE-JUDGE DISTRICT COURT.

Filed December 5, 1962.

Before SWYGERT, *Circuit Judge*, MINER and PARSONS, *District Judges.*

Per Curiam.

The Interstate Commerce Commission has granted the Chicago, North Shore & Milwaukee Railway a certificate of public convenience and necessity permitting abandonment of its entire line of railroad extending between Milwaukee, Wisconsin, and Chicago, Illinois.[1]

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1. *Chicago, North Shore & Milwaukee Railway Abandonment of Entire Operation*, Finance Docket No. 20245, 312 I. C. C. 99; 317 I. C. C. 191, Report on Reconsideration, October 15, 1962 (not printed).

The State of Illinois, Illinois Commerce Commission, and North Shore Commuters Association, plaintiffs in this proceeding, have instituted this action to set aside and enjoin the Interstate Commerce Commission's order permitting abandonment.

On June 25, 1958, the North Shore applied to the Interstate Commerce Commission under Section 1(18-20) of the Interstate Commerce Act, 49 U.S.C. § 1(18-20), for a certificate of public convenience and necessity permitting abandonment. Motions to dismiss were filed challenging the jurisdiction of the Commission on the ground that the North Shore is exempt from Commission regulation under Section 1(22), 49 U.S.C. § 1(22), as an electric interurban railroad.

On May 4, 1960, the Interim Report of the Commission, 312 I.C.C. 99, was issued. The Commission determined that the motions to dismiss should be overruled because the North Shore is not a street, suburban, or interurban electric railway within the meaning of Section 1(22). The Commission, however, deferred action on the application for a period of one year to afford the North Shore, in cooperation with the regulatory commissions, the state and local authorities, and the public, an opportunity to explore all possibilities for profitable operation, including an immediate request by the North Shore for a necessary fare increase.

On May 10, 1962, the Report of the Commission After Further Hearing, 317 I.C.C. 191, was issued. The Commission concluded and found as follows:

> We conclude and find that the present revenues have not been, and future revenues will not be, sufficient to cover the cost of applicant's continued operation with sufficient maintenance of facilities necessary to safety of operation; that abandonment of all operations is warranted, subject to the condition that applicant shall

sell the entire line, or any portion thereof, to any responsible person, firm or corporation offering, prior to the effective date of the certificate and order permitting abandonment, to purchase the same for continued operation (upon approval of this Commission) at a price not less than the net salvage value of the property sought to be acquired; that the imposition of conditions for the protection of employees adversely affected by the abandonment is not justified in the circumstances of this case; and that the inconvenience to users of applicant's service which will result from the abandonment will be mitigated by the availability of rail service provided by the Chicago & North Western Railway and the Chicago, Milwaukee, St. Paul and Pacific Railroad.

Subject to the condition mentioned, the Commission found that the present and future public convenience and necessity permit abandonment by the North Shore of its entire line of railroad, and issued an appropriate certificate and order to be effective 35 days from date of service. This effective date was subsequently extended pending disposition of various petitions for reconsideration.

On October 15, 1962, the Report of the Commission on Reconsideration, was issued. In that report, the Commission again considered and rejected the argument that the North Shore was an exempt interurban electric railway within the meaning of Section 1(22). The Commission also considered and rejected plaintiffs' argument that, even if the North Shore is subject to Commission jurisdiction, the Commission can only authorize abandonment as to interstate commerce.

In this proceeding plaintiffs challenge the action of the Interstate Commerce Commission in exercising federal authority by granting this abandonment certificate. They assert that the Commission has exceeded its jurisdiction. Primacy of state control is urged on the ground that the

North Shore is an interurban electric railroad exempted by Congress from national regulation. As an alternative, if the North Shore is found not to fall within this exemption, plaintiffs urge that federal authority is limited to abandonment of the North Shore's interstate operations.

It is apparent from the briefs and oral arguments of the opposing parties that this Court must resolve two jurisdictional questions. First, does the North Shore fall within the exemption of Section 1(22) of the Interstate Commerce Act, as being a "street, suburban, or interurban electric railway(s), . . . not operated as a part or parts of a general steam railroad system of transportation?" Second, assuming a negative answer to the first question, has Congress granted, and does the Interstate Commerce Commission have, authority to grant a certificate to the North Shore to abandon its entire operations in both intrastate and interstate commerce? We must dispose of these jurisdictional questions before considering the sufficiency of the evidence upon which the Commission granted a certificate of public convenience and necessity permitting abandonment.

For the reasons hereinafter set forth we hold that the North Shore is not within the exemption of Section 1(22) and that the authority of the Commission extends to all phases of operation—both intrastate and interstate—of the North Shore.

Plaintiffs claim that the character of the North Shore as being within the exception of Section 1(22) has been conclusively determined by the United States Supreme Court and therefore the Commission lacked authority to confer on it a status inconsistent with the Supreme Court's ruling.

The Supreme Court in *United States* v. *Chicago, North Shore and Milwaukee Railroad*, 288 U. S. 1 (1933), held that the North Shore fell within the exemption of Section

20a of the Interstate Commerce Act. Section 20a contains wording which is identical to that of Section 1(22). In examining the activities of the North Shore, the Court concluded:

> We thus have a typical example of an interurban electric line for passenger service, which has developed, in addition, such freight traffic as could advantageously be undertaken without interfering with performance of the main purpose of the carrier. The facts differentiate the case from *Piedmont & Northern Railway Co.* v. *Interstate Commerce Commission*. . . . There the railroad was predominantly a carrier of interchange carload freight. . . . The purely local traffic in freight, passengers, baggage and express was there relatively inconsequential; but here greatly preponderates.

The Supreme Court was asked to conclude that the North Shore railroad had issued securities over a period of ten years in violation of Section 20, wherein such conclusions might have rendered these securities of no value. Throughout the period in which they were issued the Commission had never challenged the right or authority of the North Shore to issue these securities. That the Court's decision was influenced by an estoppel rationale based on the Railroad's reliance on past administrative rulings is evident:

> With this knowledge of the situation the Commission never, until it requested the attorney-general to institute the present suit, by word or act intimated that the procedure followed by the railroad was illegal or the state regulatory bodies without jurisdiction. It would be difficult indeed to conceive a clearer case of uniform administrative construction of § 20a as applied to this company. *Conceding that the proper classification of the railway is not free from difficulty,* all doubt is removed by the application of the rule that settled administrative construction is entitled to great weight and should not be overturned except for cogent reasons. . . . The primary responsibility rested upon the Commission to determine whether under the circumstances the

> railway was required to procure leave under § 20a for the issuance of securities. Evidently entertaining serious doubts on this question it has for more than a decade resolved them in favor of the carrier, and the company and its officers have acted in reliance on the administrative tribunal's construction of the statute. At this late day the courts ought not to uphold an application of the law contradictory of this settled administrative interpretation. (Emphasis supplied.)

In 1941, the Court of Appeals for the Seventh Circuit in *Sprague* v. *Wolf*, 122 F. 2d 128, cert. denied, 314 U. S. 669, interpreted a provision of the Railway Labor Act so as to conclude that the North Shore did not fall within the exemption of 45 U. S. C. § 451. The wording of that particular statute, although similar to the exception of Section 1(22) of the Interstate Commerce Act, specifically excludes from the exception "any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power." The Court, however, agreed with the Commission that the North Shore was both "not a street, interurban, or electric railway within the meaning of the exemption provisos" (in the three statutes being considered by the Commission) "*and* that it was a part of the general steam-railroad system of transportation." (at 130.)

In discussing the effect of the *North Shore* case, *supra*, the Court of Appeals distinguished the facts and concluded that the motivating reason for that decision was the reliance or estoppel considerations. It further stated at page 131:

> Under all the circumstances we are of the opinion that the holding of the Court did not bind the Commission as to subsequent determinations, and that the duty imposed upon the Commission by the Acts here involved was to be discharged in a proceeding de novo, and in accordance with all the evidence to be adduced in such proceeding.

In 1942, the Court of Appeals for the Seventh Circuit in *In re Chicago, North Shore and Milwaukee Railroad Company*, 131 F. 2d 458, was asked to interpret a section of the Bankruptcy Act in its application to the North Shore railroad. Section 77 of that Act applies to "Any common carrier . . . except a street, suburban or interurban electric railway which is not operated as *a* part of a general railroad system of transportation or *which does not derive more than 50 per centum of its operating revenues from the transportation of freight in standard steam railroad freight equipment.*" (Emphasis supplied.) The court concluded that the North Shore fell within the exception of Section 77, and even went so far as to say, "We think there can be no question but that this road is not 'operating as part of a general steam railroad system of transportation.'" The 50 per centum freight revenue requirement was accorded great weight in the court's final determination, as was the district court's right, under the Bankruptcy Act, to make an independent determination of the Railroad's status. This decision interpreted a statute which differs materially from the Interstate Commerce Act in both its underlying purpose and in its jurisdictional tests. For this reason the 1942 Court of Appeals' decision was not binding on the Commission in the proceeding which is now being reviewed.

It is apparent from the decisions following the Supreme Court *North Shore* case that exemptions similar to Section 1(22), but which are found in other provisions of the Interstate Commerce Act, or in other Acts, allow different interpretations, depending on the purpose of the Act, the underlying issues, and the particular facts of the case.

Upon holding that the Commission is not bound by the Supreme Court's determination in its classification of the North Shore, we must now decide the extent to which this court may review the jurisdictional classification made by

the Interstate Commerce Commission in the present application for abandonment.

In *U. S.* v. *Idaho*, 298 U. S. 105 (1936), the Supreme Court, in reviewing the findings of the district court which concluded that a branch of the Oregon Railroad was a "spur" under Section 1(22), held at page 109:

> The decree should be affirmed, because on findings amply supported by the evidence the trackage is a spur. Appellants object that, since the findings and order of the Interstate Commerce Commission were made on substantial evidence, they are conclusive, and that it was error to admit the testimony first offered in the District Court. . . . Although it would have been better practice to have introduced all relevant evidence before the Commission, as appellee's counsel concede, the court did not err in admitting the additional testimony. For whether certain trackage is a "spur" is a mixed question of fact and law left by Congress to the decision of a court—not to the final determination of either the federal or a state commission.

The opinion by Justice Brandeis, while acknowledging that the district court had jurisdiction to determine the classification of the Oregon railroad, did not deny that the determination of the Commission should be given great weight. It merely concluded that the ultimate decision was left to the courts and not to the Commission.

In *City of Yonkers* v. *United States*, 320 U. S. 685 (1943), the Supreme Court was again called upon to review the findings of a district court in determining whether certain operations of the New York Central fell under the exception of Section 1(22). Although agreeing with Justice Brandeis that the determination of what is included within the exemption of Section 1(22) involves a "mixed question of fact and law," the Court nevertheless concluded that the Commission should first determine whether the railroad falls within its jurisdiction. In recognizing the importance

of the Commission's findings, the Court said at pages 691-692:

> It is hardly enough to say that the Commission's orders may be set aside by the courts where the Commission exceeds its authority. The Commission has a special competence to deal with the transportation problems which are reflected in these questions. The Congress has entrusted to the Commission the initial responsibility for determining through application of the statutory standards the appropriate line between the federal and state domains. . . . The insistence that the Commission make these jurisdictional findings before it undertakes to act not only gives added assurance that the local interests for which Congress expressed its solicitude will be safeguarded. *It also gives to the reviewing courts the assistance of an expert judgment on a knotty phase of a technical subject.*
>
> • • • • •
>
> This is not to insist on formalities and to burden the administrative process with ritualistic requirements. It entails a matter of great substance. It requires the Commission to heed the mandates of the Act and to make the expert determinations which are conditions precedent to its authority to act. (Emphasis supplied.)

The case was remanded and the Commission held that it had jurisdiction after it had made detailed subordinate findings of fact. The district court affirmed, 56 F. Supp. 351, and on review the Supreme Court sustained, 323 U. S. 675 (1944). The Court stated at page 675:

> On remand of the case . . . to the Interstate Commerce Commission for further findings, the Commission reopened the case, took further evidence, and made additional findings. Upon examination of the case now here on appeal we conclude that those findings are sufficient to support the order, and the evidence is sufficient to support the findings. The judgment is affirmed.

We think these two Supreme Court opinions settle the question of the scope of judicial review so that we may conclude that although this Court is not bound by the determinations of the Commission and that the doctrine of "substantial evidence" is not specifically applicable, nevertheless great weight must be given to the determination of the Commission in an order such as this in which its special competence is clearly recognized.

In the instant abandonment proceeding, the Commission, in its Report On Reconsideration dated October 15, 1962, referred to its Interim Report of May 4, 1960, 312 I.C.C. 99, which in turn referred to the Commission's earlier decision in *Chicago, N.S. and M. Ry. Abandonment*, 290 I.C.C. 765 (1955), which authorized the abandonment of portions of the North Shore line. As stated by the Commission in its Report On Reconsideration, this 1955 decision contains a complete and comprehensive discussion of the jurisdictional facts relating to the North Shore. The Commission points out that these facts are at present essentially the same[2] and concludes that the North Shore does not fall within the exception contained in Section 1(22).

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2. "The physical characteristics of applicant remain essentially unchanged since our decision in *Chicago, N. S. & M. Ry. Abandonment, supra*. It continues to engage in the transportation of both passengers and property across the Wisconsin-Illinois State line. While it is principally a passenger carrier, we found in the cited decision (p. 769) that freight accounted for approximately 16.5 percent of its total operating revenues in 1953. The record herein discloses that in 1960 freight traffic accounted for about 14.6 percent of its total revenues. Practically all of the freight handled is interchanged with other railroads. Applicant's line is physically connected at six different points with one or more interstate carriers, namely the Elgin, Joliet & Eastern Railway, the Chicago, Milwaukee, St. Paul and Pacific Railway, the Minneapolis, St. Paul and Sault Ste. Marie Railroad, and the Chicago and North Western Railroad, and it continues to participate in more than 1,000 tariffs with class I trunk line carriers. We need not elaborate further. Other status-determining characteristics of applicant detailed in our decision cited above continue to be present."

Plaintiffs neither dispute the underlying facts set out in 290 I.C.C. 765, nor that those facts remain essentially unchanged. The only question before us then is whether these facts have been properly interpreted and whether they support the Commission's conclusion that the North Shore does not fall within the exception contained in Section 1(22). We think that the Commission has upon an abundance of evidence correctly determined that the North Shore does not fall within the exception and is therefore subject to Section 1(18) of the Act.

We now turn to plaintiffs' contention that even if the North Shore is an interstate carrier over which the Commission has jurisdiction, and even if the evidence justifies a certificate of public convenience and necessity permitting abandonment, it must be limited to the interstate operations of the carrier.

The Commission, in authorizing abandonment of the entire system of the railroad, based its decision upon two grounds: (1) the North Shore crosses a stateline; and (2) even if the North Shore's operations were confined to intrastate commerce, such restricted operations would constitute an undue burden upon interstate commerce.

The Commission has consistently asserted exclusive jurisdiction to authorize complete abandonment of a railroad line where the railroad operates such line in more than one state, *Tonopah & T.R. Co. Abandonment*, 236 I.C.C. 265; *Missouri & Ark. Ry. Co. Receivers Abandonment*, 271 I.C.C. 171.

Where a railroad physically crosses a state line and carries on both interstate and intrastate business over the same tracks in an integrated system of operation and where "the two services are inextricably intertwined" (*Colorado v. United States*, 271 U. S. 153, 164), the Commission's exclusive jurisdiction over the railroad's interstate opera-

tions includes its intrastate operations as well. This conclusion is supported by the legislative history of the Interstate Commerce Act.

We agree with the Commission's well supported findings that the systemwide operations of the North Shore are not capable of a practical disjunction and hence the railroad fits squarely within the above rule.[3]

The Commission in its Report on Reconsideration also found a burden on interstate commerce even if the North Shore were permitted to operate solely as to intrastate commerce.[4] We think these findings are supported by the evidence.

3. "Applicant's line physically crosses the State boundary between Wisconsin and Illinois and it operates in both States, handling passengers, baggage and freight in intrastate and interstate commerce. Interline tickets are sold for transportation to and from points on its system and because of its connections with other interstate railroads, as heretofore mentioned, it is able to participate in freight bridge traffic. Its intrastate and interstate operations are co-mingled and are being conducted as part of the same service. In finding that public convenience and necessity permit the abandonment, we necessarily considered the entire operation and the needs of the public for both interstate and intrastate service. As we stated in our prior report after further hearing, all of applicant's present revenues from both interstate and intrastate operations are not sufficient to maintain the facilities necessary to safety of operation. It is obvious that revenues from intrastate operations alone would be insufficient to permit continued safe operations."

4. "It was also shown in our last report that the Chicago & North Western Railway Company (North Western) serves the considered area between Milwaukee and Chicago, its tracks being located slightly west of and generally parallel to the main line of applicant. The Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Milwaukee) also operates in this area. Although it does not have comparable stations at all of the points served by the other two carriers, its line is located slightly east of the applicant's line, parallels it in part, and is separated by distances ranging from 0.25 mile to 2.4 miles. North Western has spent considerable sums for new cars and advertising to increase the patronage on its Milwaukee-Chicago trains. It sustained deficits amounting to approximately $2 million on these operations in

It is no longer open to doubt that where the operation of a railroad line, or a part of a line, vitally affects the revenues of an interstate carrier, the Commission may authorize abandonments not only of the interstate operations but also of the intrastate operations as well. *Colorado* v. *United States*, *supra*; *Transit Commission* v. *United States*, 284 U. S. 360 (1932). While not dealing with railroads, *Wickard* v. *Filburn*, 317 U. S. 111 (1942), a landmark case, makes this abundantly clear. There the Supreme Court quoted with approval the following language from *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110, 119:

> The commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of

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1958-1959, and, like applicant, has been faced with the problem of declining patronage.

"Each of the three railroads operating in this area are competitive for certain of their passengers moving in intrastate as well as interstate commerce. It is clear that the traffic is not sufficient to support all on a reasonably profitable basis. If applicant continues operations, either on the present basis or solely in intrastate commerce, it will carry passengers who otherwise would patronize the North Western or Milwaukee. Thus, the ability of those railroads to continue their present operations in interstate or foreign commerce should be improved by the proposed abandonment by applicant.

"It also is important to note that a certificate issued by us authorizing abandonment is permissive and, at applicant's election, the authority granted may or may not be exercised. If our certificate were limited to abandonment of operations in interstate and foreign commerce and the applicant were compelled by the States to continue intrastate operations over separate segments in Illinois and Wisconsin, the economics of the situation would dictate that applicant continue its interstate operations in order to minimize its losses. This would be so notwithstanding our finding that applicant's revenues are such as to make it difficult for a carrier to maintain its facilities in a manner that would insure safe operations. The likely result would be the safety of interstate as well as intrastate passengers would be endangered.

"We conclude that the continued operation of the applicant's line, even if confined to intrastate commerce, would constitute an undue burden upon interstate commerce."

> Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce. . . . The power of Congress over interstate commerce is plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. . . . It follows that no form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress. Hence the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power.

Plaintiffs cite *Texas* v. *Eastern Texas Ry. Co.*, 258 U. S. 204 (1922), in support of the proposition that the Commission has no authority to affect the intrastate operations of the North Shore. This case is readily distinguishable. In *Eastern Texas* the court concluded that the railroad was entirely within a single state, was owned and operated by a corporation of that state, and was not a part of another line. It further concluded that interstate commerce would not be burdened or affected by its continued operation. In the case at bar, the North Shore operates in both Wisconsin and Illinois, and its intrastate and interstate operations cannot be separated realistically. Furthermore, the Commission found that the continued operation of any portion of the North Shore line would unreasonably burden interstate commerce.

There seems to be no contention by plaintiffs that the evidence is insufficient to justify the issuance of a certificate of public convenience and necessity authorizing abandonment if it is limited solely to interstate operations, provided their position with respect to Section 1(22) is held to be unsound. Indeed, we do not see how such a contention could very well be made in the face of the findings of fact upon which the certificate is based.

In its Report dated May 10, 1962, the Commission found that "the present revenues have not been, and future revenues will not be, sufficient to cover the cost of applicant's continued operation with sufficient maintenance of facilities necessary to safety of operation. . . ." This conclusion is justified by the evidence. The outstanding single fact supporting this conclusion is that the North Shore for a thirty-year period covering the years 1932 through 1961 (except during the World War II years 1941-1946) has sustained large operating losses. The Commission found that if normal maintenance were included in the North Shore costs, it would result in deficits of $624,000 in 1959; $693,000 in 1960; and $762,000 for the year ending May 31, 1961. The actual operating deficits for the years 1955 to 1961 are set out below.[5]

Since we have determined that the Commission had jurisdiction to authorize abandonment of the intrastate as well as the interstate operation of the railroad, we now conclude that the evidence justified the issuance of the certificate.

Accordingly, the complaint herein is dismissed and the counterclaim requesting that the plaintiffs and each of them, their agents, employees and attorneys be enjoined by the decree of this court from in any manner interfering with the defendant's right to terminate its entire operations and dispose of its property all in accordance with and pursuant to the authority conferred by the certificate of the Interstate Commerce Commission in its order and certifi-

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5. "Year — Operating deficit
1955 ..... $661,874
1956 515,067
1957 603,413
1958 462,615
1959 398,835
1960 468,239
Ended May 31, 1961 .. 539,872"

cate issued May 10, 1962, is granted. A decree consistent herewith will be entered.

Luther M. Swygert
Luther M. Swygert, *Circuit Judge*
Julius H. Miner
Julius H. Miner, *District Judge*
James B. Parsons
James B. Parsons, *District Judge*

Service Date
Oct. 18, 1962

EXTRACT FROM REPORT AND ORDER OF INTERSTATE COMMERCE COMMISSION.

(Dated October 15, 1962.)

Finance Docket No. 20245.

CHICAGO, NORTH SHORE & MILWAUKEE RAILWAY
ABANDONMENT OF ENTIRE OPERATION.

Decided October 15, 1962.

Our prior report after further hearing of May 10, 1962, 317 I. C. C. 191 found, subject to a condition hereinafter described, that the present and future public convenience and necessity permit abandonment by the applicant Chicago, North Shore & Milwaukee Railway of its entire line of railroad in Milwaukee, Racine, and Kenosha Counties, Wis., and Lake and Cook Counties, Ill. The effective date of our certificate and order giving effect to those findings has been postponed pending disposition of petitions for reconsideration filed by protestants.

* * * * *

Petitioners question our jurisdiction to issue a certificate authorizing abandonment of applicant's line. First, they contend that applicant is an interurban electric railway not operated as a part of a general steam railroad system of transportation, within the purview of section 1(22) of the Interstate Commerce Act, and that, thus, abandonment of its lines is excluded from our jurisdiction.

In disposing of a similar contention that applicant is an electric interurban railway not operated as a part of a general railroad system of transportation, our interim report of May 4, 1960, 312 I. C. C. 99, referred to our earlier decision in *Chicago, N. S. & M. Ry. Abandonment*, 290 I. C.

C. 765, wherein the same question was presented. That decision contains a complete and comprehensive discussion of the applicable law and facts as related to the indicated contention, including a discussion of the cases relied upon by petitioners.

The physical characteristics of applicant remain essentially unchanged since our decision in *Chicago, N. S. & M. Ry. Abandonment, supra.* It continues to engage in the transportation of both passengers and property across the Wisconsin-Illinois State line. While it is principally a passenger carrier, we found in the cited decision (p. 769) that freight accounted for approximately 16.5 percent of its total operating revenues in 1953. The record herein discloses that in 1960 freight traffic accounted for about 14.6 percent of its total revenues. Practically all of the freight handled is interchanged with other railroads. Applicant's line is physically connected at six different points with one or more interstate carriers, namely the Elgin, Joliet & Eastern Railway, the Chicago, Milwaukee, St. Paul and Pacific Railway, the Minneapolis, St. Paul and Sault Ste. Marie Railroad, and the Chicago and North Western Railroad, and it continues to participate in more than 1,000 tariffs with class I trunk line carriers. We need not elaborate further. Other status-determining characteristics of applicant detailed in our decision cited above continue to be present. And, as we stated therein:

> From what has been said by this Commission and the courts in subsequent decisions, it also seems clear that the decision of the Supreme Court in *United States* v. *Chicago, N. S. & M. R. Co., supra,* holding the applicant's predecessor an interurban electric railway within the exemption clause of section 20a of the Interstate Commerce Act is not binding in this proceeding.

From the above, we conclude that applicant does not fall within the exemption contained in section 1(22) of the

Interstate Commerce Act, that it is subject to section 1(18) of that act, and that the application under consideration in this proceeding is a matter within our jurisdiction.

Petitioners also contend that, even if the applicant is subject to the provisions of section 1(18), we are without jurisdiction to authorize it to abandon intrastate service but are limited to authorizing abandonment as to interstate commerce, relying principally upon the decision of the United States Supreme Court in *Texas* v. *Eastern Texas R. Co.*, 258 U. S. 204. The facts in the cited case differ from those present here. There, the court referred to the fact that the railroad involved was located entirely within the State of Texas and was owned by a Texas corporation, and it found that the situation and ownership of the road were such that interstate and foreign commerce would not be burdened or affected by the continuance of intrastate business over the line.

In a later decision, *Colorado* v. *United States*, 271 U. S. 153, the court sustained our action in authorizing the total abandonment of a branch line, located wholly within Colorado, of a railroad whose system was located partly in Colorado and partly in other states. In referring to the fact that the railroad involved therein, like most other railroads, was chartered to engage in both intrastate and interstate commerce, the court made the following statement:

> The same instrumentality serves both [intrastate and interstate commerce]. The two services are inextricably intertwined. The extent and manner in which one is performed, necessarily affects the performance of the other. Efficient performance of either is dependent upon the efficient performance of the transportation system as a whole.

After noting the statutory exemptions from federal control contained in section 1(22), in respect of spur, industrial,

team, switching and side tracks, the court stated that "as to the rest of every railroad line used in interstate commerce, Congress reserved the full authority to determine whether, and to what extent, public convenience and necessity permit of abandonment."

The Court further stated that while the constitutional basis to issue a certificate of abandonment is the power of Congress to regulate interstate commerce, the statute does not make the issuance of a certificate of abandonment conditional upon a specific finding that continued operation will result in discrimination against interstate commerce or that it will result in a denial of just compensation for the use in intrastate commerce of the property of the carrier. Under the statute, the sole test prescribed is that the abandonment be consistent with public convenience and necessity, and in its determination the "Commission must have regard to the needs of both intrastate and interstate commerce." In discussing this, the Court indicated that an application for abandonment rarely involves an actual conflict between the needs of interstate and intrastate commerce. But wherever such conflicting needs exist, "the determination is made upon a balancing of the respective interests—the effort being to decide what fairness to all concerned demands." In that balancing, "the fact of demonstrated prejudice to interstate commerce and the absence of earnings adequate to afford reasonable compensation are, of course, relevant and may often be controlling. But the act does not make issuance of the certificate dependent upon a specific finding to that effect."

We consistently have construed the *Eastern Texas R. Co.* case, *supra*, to apply only to abandonments of an entire line of railroad located within one State and not operated

as a part of an interstate railway system.[3] In such class of cases, our certificates have authorized only abandonment of operations in interstate or foreign commerce. (*Grand River Valley R. Co. Abandonment*, 202 I. C. C. 359; *Nezperce & I. R. Co. Abandonment*, 257 I. C. C. 81). On the other hand, we consistently have asserted exclusive jurisdiction to authorize complete abandonment of a line of railroad in the following classes of cases: (1) Abandonment of a portion of a line of railroad by an applicant operating solely within a single State (*Abandonment by Detroit & Mackinac Ry. Co.*, 138 I. C. C. 576); (2) Abandonment of a line wholly within a State by a carrier which operates a railroad in more than one State or which is a part of a system operating in more than one State (*Chesterfield & L. R. Co. Receivers Abandonment*, 244 I. C. C. 20); and (3) abandonments, as in the instant case, involving a line operated in more than one State (*Tonopah & T. R. Co. Abandonment*, 236 I. C. C. 265; *Missouri & A. Ry. Co. Receivers Abandonment*, 271 I. C. C. 171).

Applicant's line physically crosses the State boundary between Wisconsin and Illinois and it operates in both States, handling passengers, baggage and freight in intrastate and interstate commerce. Interline tickets are sold for transportation to and from points on its system and because of its connections with other interstate railroads, as heretofore mentioned, it is able to participate in freight bridge traffic. Its intrastate and interstate operations are co-mingled and are being conducted as part of the same service. In finding that public convenience and necessity permit the abandonment, we necessarily considered the

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3. At first blush, the decision in *Jay Street Connecting R. R. Abandonment of Entire Line*, 307 I. C. C. 137, may seem inconsistent with the stated principle. However, in that case, although the railroad tracks involved were located solely within one State, the applicant's car float and lighterage operations extended into another state.

entire operation and the needs of the public for both interstate and intrastate service. As we stated in our prior report after further hearing, all of applicant's present revenues from both interstate and intrastate operations are not sufficient to maintain the facilities necessary to safety of operation. It is obvious that revenues from intrastate operations alone would be insufficient to permit continued safe operations.

It was also shown in our last report that the Chicago & North Western Railway Company (North Western) serves the considered area between Milwaukee and Chicago, its tracks being located slightly west of and generally parallel to the main line of applicant. The Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Milwaukee) also operates in this area. Although it does not have comparable stations at all of the points served by the other two carriers, its line is located slightly east of the applicant's line, parallels it in part, and is separated by distances ranging from 0.25 mile to 2.4 miles. North Western has spent considerable sums for new cars and advertising to increase the patronage on its Milwaukee-Chicago trains. It sustained deficits amounting to approximately $2 million on these operations in 1958-1959, and, like applicant, has been faced with the problem of declining patronage.

Each of the three railroads operating in this area are competitive for certain of their passengers moving in intrastate as well as interstate commerce. It is clear that the traffic is not sufficient to support all on a reasonably profitable basis. If applicant continues operations, either on the present basis or solely in intrastate commerce, it will carry passengers who otherwise would patronize the North Western or Milwaukee. Thus, the ability of those railroads to continue their present operations in interstate or foreign commerce should be improved by the proposed abandonment by applicant.

It also is important to note that a certificate issued by us authorizing abandonment is permissive and, at applicant's election, the authority granted may or may not be exercised. If our certificate were limited to abandonment of operations in interstate and foreign commerce and the applicant were compelled by the States to continue intrastate operations over separate segments in Illinois and Wisconsin, the economics of the situation would dictate that applicant continue its interstate operations in order to minimize its losses. This would be so notwithstanding our finding that applicant's revenues are such as to make it difficult for a carrier to maintain its facilities in a manner that would insure safe operations. The likely result would be the safety of interstate as well intrastate passengers would be endangered.

We conclude that the continued operation of the applicant's line, even if confined to intrastate commerce, would constitute an undue burden upon interstate commerce. However, as the Court pointed out in the *Colorado* case, the Commission's jurisdiction under section 1(18) of the act is not limited to operations in interstate commerce and to such intrastate operations as may be found to impose an undue burden on interstate commerce. 271 U. S. at 164. Section 1(18) is not limited to the abandonment of interstate operations but by its terms includes "all or any portion of a line of railroad" subject to Part I of the act. Furthermore, paragraph 20 of section 1 provides that from and after issuance of the certificate, the applicant may proceed to abandon "without securing approval other than such certificate." When the Commission finds that the public convenience and necessity permit the abandonment of an entire line of railroad located in more than one State, the States involved cannot frustrate that action by requiring a continuance of intrastate operations. While the existence of an undue burden on interstate commerce properly may be used to state or to justify a particular result,

it is not necessary for the Commission to find such a burden where, as here, regulation of the intrastate activities in question is a necessary and proper consequence of effective exercise of the power to regulate interstate commerce. Cf. *Colorado* v. *United States, supra.*

* * * * * * *

* * * we affirm our prior finding that the present and future public convenience and necessity permit abandonment by the Chicago, North Shore and Milwaukee Railway of its entire line of railroad in Milwaukee, Racine and Kenosha Counties, Wis., and Lake and Cook Counties, Ill.

An appropriate order will be entered.

COMMISSIONERS FREAS and HERRING concur in the result.

COMMISSIONER TUCKER did not participate.

ORDER.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 15th day of October, A. D. 1962.

Finance Docket No. 20245.

CHICAGO, NORTH SHORE & MILWAUKEE RAILWAY
ABANDONMENT OF ENTIRE OPERATIONS.

Further investigation of the matters and things herein involved having been made, and the Commission on the date hereof having made and filed its report on reconsideration, which report, the interim report of May 4, 1960, and the report after further hearing of May 10, 1962, are hereby made a part hereof:

It is ordered, That these proceedings be, and they are hereby, reopened for reconsideration on the present record;

It is further ordered, That the certificate and order herein of May 10, 1962, be, and it is hereby, modified to become effective 15 days from the date of service of this order, and to make the authorization for abandonment subject to the modified condition respecting sale of the property as set forth in the report accompanying this order; and

It is further ordered, That the petitions for reconsideration and motion for a special order, described in the report herewith be, and they are hereby, denied except to the extent granted above.

By the Commission.

HAROLD D. McCOY,
Secretary.

(SEAL)

EXTRACT FROM REPORT AND ORDER OF INTERSTATE COMMERCE COMMISSION.

(Dated May 10, 1962.)

Finance Docket No. 20245.

CHICAGO, NORTH SHORE & MILWAUKEE RAILWAY
ABANDONMENT OF ENTIRE OPERATION.

Decided May 10, 1962.

Reported 317 ICC 191.

Report of the Commission After Further Hearing.
Tuggle, Commissioner:

By our prior report of May 4, 1960, 312 ICC 99, we assumed jurisdiction under section 1 (18)-(20) of the act to consider the issues of public convenience and necessity presented by the application for abandonment, and concluded that action thereon should be deferred for a period of 1 year in order to obtain more conclusive facts bearing

on the ultimate issue. We took this action despite the continuing deficits sustained by applicant in recent years because we noted a lessening of the deficit trend in 1958, the latest period for which financial results of operations were shown in the prior report, and considered it might be eliminated by higher fares and reduced expenditures.

* * * * * *

CONCLUSION.

We conclude and find that the present revenues have not been, and future revenues will not be, sufficient to cover the cost of applicant's continued operation with sufficient maintenance of facilities necessary to safety of operation; that abandonment of all operations is warranted, subject to the condition that applicant shall sell the entire line, or any portion thereof, to any responsible person, firm or corporation offering, prior to the effective date of the certificate and order permitting abandonment, to purchase the same for continued operation (upon approval of this Commission) at a price not less than the net salvage value of the property sought to be acquired; * * *

Subject to the condition stated, we find that the present and future public convenience and necessity permit the abandonment by the Chicago, North Shore & Milwaukee Railway of its entire line of railroad in Milwaukee, Racine and Kenosha Counties, Wis., and Lake and Cook Counties, Ill.

An appropriate certificate and order will be issued, effective 35 days from date of service. * * *

CERTIFICATE AND ORDER.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 10th day of May, A. D. 1962.

Finance Docket No. 20245.

CHICAGO, NORTH SHORE & MILWAUKEE RAILWAY
ABANDONMENT OF ENTIRE OPERATION.

* * * * * * *

Further investigation of the matters and things involved herein having been made, and the Commission, on the date hereof, having made and filed a report after further hearing containing its findings of fact and conclusions thereon, which report hereby referred to and made a part hereof:

It is hereby certified, That, in Finance Docket No. 20245, subject to the condition relating to the sale of the line, or any portion thereof, for operation as referred to in said report after further hearing, the present and future public convenience and necessity permit abandonment by Chicago, North Shore & Milwaukee Railroad of its entire line of railroad in Milwaukee, Racine and Kenosha Counties, Wis., and Lake and Cook Counties, Ill., described in the reports aforesaid;

It is ordered, That this certificate shall take effect and be in force from and after 35 days from the date of service thereof. * * *

* * * * * * *

By the Commission.

HAROLD D. McCOY,
Secretary.

(SEAL)

EXTRACT FROM REPORT AND ORDER OF INTERSTATE COMMERCE COMMISSION.

(Dated May 4, 1960.)

Finance Docket No. 20245.

CHICAGO, NORTH SHORE & MILWAUKEE RAILWAY
ABANDONMENT OF ENTIRE OPERATION.

Decided May 4, 1960.
Reported 312 ICC 99.

INTERIM REPORT OF THE COMMISSION.

By the Commission:

The Chicago, North Shore and Milwaukee Railway, hereinafter sometimes referred to as the applicant or the North Shore, is an electric railroad subject to the provisions of part I of the Interstate Commerce Act. On June 25, 1958, the North Shore applied under section 1(18)-(20) of the act for a certificate of public convenience and necessity permitting abandonment, or abandonment of operations, of its entire line of railroad extending generally between Milwaukee, Wis., and Chicago, Ill.; between Lake Bluff and Mundelein, Ill.; and between North Chicago Junction and Elm Place, Highland Park, Ill.; a total distance of approximately 106.05 miles, in Milwaukee, Racine and Kenosha Counties, Wis., and Lake and Cook Counties, Ill. Except for a short segment in Milwaukee where applicant operates over a line of its wholly owned subsidiary, and between Howard Street and Roosevelt Road, Chicago, approximately 12.04 miles, where the applicant operates under trackage rights over the elevated line of the Chicago Transit Authority, all the mileage sought to be abandoned is on North Shore owned right-of-way.

Similar applications with respect to the abandonment of intrastate operations by the applicant were filed with the State Commissions of Wisconsin and Illinois. Numerous protests were filed against the North Shore's proposals by and on behalf of the cities and villages served by the applicant, commuter associations, industries, railway employees' organizations, and individual users of the applicant's service. Upon request, the application filed with the Illinois Commerce Commission and the one filed with us were the subject of a joint hearing. On November 24, 1959, the Illinois Commerce Commission denied the application filed with that authority.

• • • • •

At the outset we must determine the question of law interposed by two separate motions filed by protestants challenging our jurisdiction herein. The applicant contends that we have jurisdiction. The motions are identical in that each alleges the North Shore to be an electric suburban and interurban railway not operated as a part of a general railroad system of transportation, and therefore exempt from our jurisdiction pursuant to the provisions of paragraph 22 of section 1 of the act. The same contention was presented by protestants in *Chicago, N. S. & M. Ry. Abandonment,* 290 I. C. C. 765, wherein the applicant was permitted to abandon its so-called Shore Line route in Lake and Cook Counties. The cited case contains a complete and comprehensive discussion of the law applicable to the jurisdictional question, including the cases relied upon by protestants in support of their contention, which will not be restated here. We are convinced that a railroad, such as the North Shore, operating between Chicago and Milwaukee, is not a street suburban or interurban electric railway within the meaning of section 1(22).

• • • • •

In view of the considerations mentioned herein, we conclude that action on the application should be deferred for a period of one year to enable a determination of possible continued operation by the North Shore without loss. During this time, applicant, in addition to consideration of the possible economies noted herein, should in cooperation with regulatory bodies, its employees, State and local authorities, and the public, endeavor to further explore the possibility of reducing operating expenses. Any fare increase that may be granted must be accepted and applied pending our final determination herein.

An appropriate order will be entered.

ORDER.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 4th day of May, A. D. 1960.

Finance Docket No. 20245.

CHICAGO, NORTH SHORE & MILWAUKEE RAILWAY
ABANDONMENT OF ENTIRE OPERATION.

Investigation of the matters and things involved in this proceeding having been made, hearings having been held and said Commission, on the date hereof, having made and filed an interim report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That action in this proceeding be, and it is hereby deferred for a period of one year from the date

hereof, during which time applicant in cooperation with regulatory bodies, State and local authorities, and the public, should endeavor to reduce operating expenses where such possibilities exist, and make an effort to obtain immediate fare increases designed as nearly as possible to produce, on the basis of past experience, revenues sufficient to meet the cost of operation plus a reasonable profit; it being understood that any fare increase granted is to be acepted and applied pending our final determination herein;

It is further ordered, That at the end of the year's deferment hereinabove mentioned, the matter may be brought to our attention for such other or further order as may be deemed appropriate under the circumstances then existing.

By the Commission.

HAROLD D. McCOY,
Secretary.

(SEAL)

EXTRACTS FROM NOTICE OF APPEAL BY NORTH SHORE COMMUTERS ASSOCIATION TO THE SUPREME COURT OF THE UNITED STATES.

Filed December 21, 1962.

I.

Notice is given, that North Shore Commuters Association, an Illinois corporation, and one of the Plaintiffs in this action, appeals to the Supreme Court of the United States from the final judgment and decree entered herein on December 10, 1962, by a specially constituted three-judge court, denying the relief prayed in the complaint, dismissing the complaint, and enjoining Plaintiffs "from in any manner interfering with the Defendant's [*i.e.*,

Chicago, North Shore and Milwaukee Railway's] right to terminate its entire operations and dispose of its property, all in accordance with and pursuant to the Authority conferred by the certificate of the Interstate Commerce Commission issued May 10, 1962."

This appeal is taken pursuant to Sections 1253 and 2101(b) of Title 28 United States Code.

III.

By the final judgment and decree from which this appeal is taken, the three-judge court sustained the jurisdiction of the Interstate Commerce Commission to enter its order of May 10, 1962, and subsequent order of October 15, 1962, permitting abandonment by Chicago, North Shore & Milwaukee Railway (referred to here as "the North Shore") of its entire railroad, including both the part thereof devoted to interstate commerce and the part devoted wholly to intrastate commerce.

The questions raised by the appeal are:

1. Whether the three-judge court erred:

   (a) In not holding that the North Shore's railroad is an interurban electric railway not operated as a part or parts of a general steam railroad system of transportation, and hence excluded by Paragraph (22) of Section 1, Title 49 USC, from the jurisdiction of the Interstate Commerce Commission to authorize its abandonment, in whole or in part; and

   (b) In sustaining the jurisdiction of the Interstate Commerce Commission to enter the order authorizing abandonment of the North Shore's railroad or any part thereof, and in not enjoining enforcement of that order.

2. Whether (if it is held, contrary to this Plaintiff's contention, that the North Shore's railroad is not within the exclusion provision of Paragraph (22) of Section 1, Title 49 USC) the three-judge court erred:

(a) In not holding that the Interstate Commerce Commission has no jurisdiction to authorize abandonment of that part of the North Shore's railroad which is devoted entirely to intrastate operations that do not and can not affect interstate commerce; and

(b) In sustaining the jurisdiction of the Interstate Commerce Commission to enter the order authorizing abandonment of the entire railroad, including that part devoted wholly to intrastate operation, and in not enjoining enforcement of that order insofar as it applies to such intrastate operation.

S. Ashley Guthrie,
Tenney, Sherman, Bentley & Guthrie,
Attorneys for Plaintiff,
North Shore Commuters Association.

ORDER EXTENDING TIME TO FILE RECORD.

(Entered February 6, 1963.)

* * * * *

2. The time for Plaintiff, North Shore Commuters Association to file the record and docket the appeal in this case in the Supreme Court of the United States is extended to and including March 19, 1963.

Enter:

James B. Parsons,
Judge.

EXTRACT FROM NOTICE OF APPEAL BY STATE OF ILLINOIS AND ILLINOIS COMMERCE COMMISSION TO THE SUPREME COURT OF THE UNITED STATES.

Filed February 7, 1963.

I.

Notice is hereby given that the State of Illinois and the Illinois Commerce Commission, some of the parties plaintiff herein, appeal to the Supreme Court of the United States from the Final Judgment and Decree, entered herein on December 10, 1962 by a special three-judge U. S. District Court, denying the relief prayed in the complaint, dismissing the complaint and enjoining Plaintiffs from interfering with the right of Defendant, Chicago, North Shore & Milwaukee Railway Company (hereinafter North Shore) to terminate its entire operation and dispose of its property in accordance with and pursuant to the authority conferred on it by the order and certificate of the Interstate Commerce Commission issued May 10, 1962.

By said Final Judgment and Decree the special District Court sustained the jurisdiction of the Interstate Commerce Commission, acting pursuant to Section 1, Paragraphs (18) to (20) inclusive, Title 49, U. S. Code, to permit Defendant, North Shore, to abandon its entire line of railroad including the part thereof devoted wholly to Illinois intrastate commerce.

II.

This appeal is taken pursuant to Sections 1253 and 2101(b), Title 28 U. S. Code.

• • • • • •

IV.

The following questions are presented by this appeal:

1. Whether the Special District Court erred in holding that Defendant, North Shore, is not a street, suburban or interurban electric railway which is not operated as a part or parts of a general steam railroad system of transportation and, therefore, is not excluded, by Paragraph (22) of Section 1, Title 49 U. S. Code, from the jurisdiction of the Interstate Commerce Commission to authorize its abandonment.

2. Whether, assuming *arguendo* the North Shore is not within the exclusion of Section 1, Paragraph (22), Title 49, U. S. Code, the Interstate Commerce Commission, nevertheless, has jurisdiction to authorize abandonment of that part of the North Shore's railroad which is wholly devoted to Illinois intrastate commerce.

STATE OF ILLINOIS,
ILLINOIS COMMERCE COMMISSION,
By /s/ WILLIAM G. CLARK,
Attorney General of the State of Illinois,
160 N. LaSalle Street,
Chicago 1, Illinois.

EDWARD V. HANRAHAN,
Special Assistant Attorney General;
Of Counsel.

STATUTES.

Extracts From Interstate Commerce Act

Title 49, United States Code.

Section 1, Title 49 USC:

"Carriers Subject To Regulation.

(1) The provisions of this chapter shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water * * *.

From one State or Territory of the United States, or the District of Columbia to any other State or Territory of the United States, or the District of Columbia * * *.

Transportation Subject To Regulation.

(2) The provisions of this chapter shall also apply to such transportation of passengers and property and transmission of intelligence, but only insofar as such transportation or transmission takes place within the United States, but shall not apply—

(a) To the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State and not shipped to or from a foreign country from or to any place in the United States as aforesaid, except as otherwise provided in this chapter; * * *."

Section 1, Paragraph (18)—Title 49 USC:

"(18) * * * no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commis-

sion a certificate that the present or future public convenience and necessity permit of such abandonment. * * *"

Section 1, Paragraph (20)—Title 49 USC:

"(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, * * *. From and after issuance of such certificate, and not before, the carrier by railroad may * * * proceed with * * * the abandonment covered thereby. Any * * * abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; * * *."

Section 1, Paragraph (22)—Title 49 USC:

"(22) The authority of the Commission conferred by paragraphs (18) to (21) of this section, both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

EXTRACTS FROM THE JUDICIAL CODE

TITLE 28.

Section 1253—Title 28 USC:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court for an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

Section 1336—Title 28 USC:

> "Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission."

Section 2325—Title 28 USC:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."